



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE:

CASE NUMBER: 43966/2020

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

7 June 2022

DATE



SIGNATURE

In the application for leave to appeal between :

TZANENG TREATED TIMBERS (PTY) LTD

Applicant

and

KOMATILAND FOREST SOC LIMITED

First Respondent

PEET COETZEE SC N.O.

Second Respondent

In the matter between :

TZANENG TREATED TIMBERS (PTY) LTD

Applicant

and

KOMATILAND FOREST SOC LIMITED

First Respondent

PEET COETZEE SC N.O.

Second Respondent

JUDGMENT

Heard on: 7 June 2022

Judgment handed down: (by publication on CaseLines)

VAN ZYL AJ

INTRODUCTION

1. This is an application for leave to appeal against the whole of this court's judgment and order of 22 June 2021. The background to the application and the facts appear from the judgment and are not repeated herein.
2. The notice of application for leave to appeal is unfortunately a study in what was deprecated in *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 385G – H. In the end counsel for the Applicant focused his argument on the following three grounds:
 - 2.1 First, whether there was an agreement to confer authority on the arbitrator to decide upon his own jurisdiction (which I hereinafter refer to for the sake of convenience as **“the jurisdiction**

agreement") was not an issue before Court and hence should not have been decided upon ("**the no issue ground**").

2.2 Second, on the facts the court erred in deciding that the jurisdiction agreement had been reached ("**the factual error ground**").

2.3 Third, the court erred in the manner in which it exercised its discretion not to grant declaratory relief ("**the discretionary error ground**").

3. I deal with each of these grounds in turn.

THE NO ISSUE GROUND

4. In the founding affidavit, deposed to by Mr Du Plessis, he related that a pre-arbitration meeting was held on 6 July 2020 and that a minute of that meeting was subsequently prepared by Mr Els, who attended the meeting on behalf of the Applicant. This was not in dispute.

5. Mr Mpontshana of the First Respondent took issue with the recordals in paragraphs 2.7 and 4.4 of the 6 July 2020 draft minute and added additional wording. That was also not in dispute.

6. On 9 July 2020, the arbitrator concurred with Mr Mpontshana's version of the minute and circulated a further minute for the parties' signature. (The arbitrator included minor grammatical amendments which were of no moment.) This too was not in dispute.

7. On 24 August 2020, Mr Erasmus, the applicant's attorney of record forwarded a minute to the arbitrator and Mr Mpontshana in which the portions added by Mr Mpontshana had been redacted, along with the Applicant's Statement of Defence. This too was not in dispute.
8. On 25 August 2020, Mr Mpontshana replied to Mr Erasmus' email of the previous day and stated that "*the Claimant rejects the 'amended and signed minute' but acknowledge (sic) receipt of the 3 (three) Defendant's pleas*". This too was not in dispute.
9. In the answering affidavit, deposed to by Mr Mpontshana, he *inter alia* stated:

9.1

"18.

It is self-evident that the Applicant may, as it has done, choose to contest the arbitrator's jurisdiction. In that context, the arbitrator is not obliged to forthwith withdraw from the matter, but is entitled to enquire into the merits of his jurisdiction for the purpose of satisfying himself as a preliminary matter whether he ought to proceed with the arbitration. The Applicant has agree to that process and in matter of fact, has raised the issue by a special plea." (Emphasis added.)

9.2

"31

[...] *The original minute did not reflect the common law nor the matters which were debated and agreed.*

32.

The First Respondent has executed the pre-arbitration meeting minute, which appears as annexure “A16” [the minute prepared on 6 July 2020]. That document was signed by me, even with the deletion imposed by the Applicant at clause 2.7. I confirm my signature as it appears at indexed page 224.”

10. Later in his affidavit, Mr Mpontshana also states that the Applicant was invited to sign the 9 July 2020 minute. This conflicts with the statements in paragraphs 31 and 32 of his affidavit and his invitation is superfluous in light of his earlier statements. Be that as it may, the jurisdiction agreement and its effects on the Applicant's application were raised squarely by Mr Mpontshana.
11. Mr Du Plessis took issue with Mr Mpontshana's statements (albeit at times obliquely).
12. The issue on whether the jurisdiction agreement was concluded and what its effect was also addressed at paragraph 6 of Mr Pillay SC's heads of argument.
13. During the course of the hearing the court debated the impact of an agreement to confer authority on the arbitrator to rule upon his own jurisdiction with Mr Els. It is for that very reason that paragraph 84.1 of the judgment records the following:

“First, none of the minutes record that Du Plessis was present at the 6 July 2020 meeting. He can therefore not speak to what was discussed or not. There is also no confirmatory affidavit from Els, who acted as counsel for Tzaneng in the present application. Mr Els sought to make statements from the bar regarding what occurred at the meeting, but that is not permissible and I have taken no cognisance of his submissions that strayed beyond what may permissibly be made on the affidavits before me. On the facts the *prima facie* proof of what was discussed at the procedural meeting stands firm.”

14. At no stage during the proceedings was the point raised that the debate had embarked upon matters that were not placed in issue or that the Applicant had been taken by surprise.
15. In addition, the notice of application for leave to appeal makes no mention of this point argued by Mr Els. To the contrary, it contends that the court erred in its findings that there was an agreement between the parties to give the arbitrator the authority to rule on his own jurisdiction.
16. In the premises, I see no merit in Mr Els's argument.

THE FACTUAL ERROR GROUND

17. It is contended that the court erred in coming to the conclusion that the jurisdiction agreement had been concluded.
18. I have carefully considered the facts and the analysis of those facts as set out in paragraphs 78 to 91 of the judgment. I am unpersuaded that another court would come to a different conclusion on what the facts are.
19. A further arrow strung by Mr Els was that the facts show that the parties eventually did not reduce their agreement to writing, because there is no signed minute. The argument does not hold water for two reasons:
 - 19.1 The first reason is that there is no basis for imposing an in-writing requirement as a secondary step to the validity of the jurisdiction agreement.

19.2 The second reason is that the argument misconstrues the purpose and value of the minute. The first enquiry is whether the jurisdiction agreement was concluded at the 6 July 2020 meeting. On the facts such an agreement was reached. The second enquiry is whether the minute accurately recorded the terms of the jurisdiction. Again, the facts show that the 9 July 2020 minute accurately recorded the jurisdiction agreement.

20. I accordingly do not agree with Mr Els' argument on the second ground.

THE DISCRETIONARY ERROR GROUND

21. For the reasons set out below, the appealability of the exercise of the court's discretion is assumed, without expressly pronouncing thereupon.

22. The focal point of the Applicant's attack on the manner in which the court's discretion was exercised is the First Respondent's apparent lack of prospects of success in the arbitration.

23. The relevant passages appear at paragraphs 60 to 65 of the judgment. Neither counsel took issue with this analysis. In paragraph 65 it was then held that "*what remains is an argument based on what seems to be a fatally flawed premise*" (my emphasis). The seemingly fatally flawed premise is that set out in paragraph 62 of the judgment. The finding in paragraph 70 that a notional dispute exists and that it remains for the Arbitrator to determine whether there actually is an arbitral dispute before him, is therefore correct.

24. The analysis in paragraphs 60 to 66 of the judgment, however, makes no final findings in regard to the merits or demerits of the First Respondent's case on jurisdiction. On the authorities cited in paragraphs 66 to 69 of the judgment, the analysis done and the views expressed in the judgment are in no way improper.
25. As is evident from the judgment, there were two factors that weighed in the court's exercise of its discretion. The first concerned the general principle set out in paragraph 39 of the judgment that a party should not be put through unnecessary costs in defending a weak jurisdictional case. (I refer to this hereinafter as the "cost consideration".) The second was the deference that should be paid to the parties' agreement that the Arbitrator should specifically be given the power to rule on his jurisdiction. The latter consideration specifically concerns the unique facts in the present matter. For convenience I deal with the two factors in reverse order.
26. In the present matter the parties specifically agreed that the issue of the arbitrator's jurisdiction would be considered and determined by the arbitrator. This was done by way of the jurisdiction agreement. The jurisdiction agreement was reached at a time when the Applicant was already convinced that there was no merit in the First Respondent's claims and the arbitrator had no jurisdiction. The relief sought by the Applicant runs completely contrary to what was agreed and amounts to the Applicant reneging from the very bargain that it had struck by way of the jurisdiction agreement.

27. In keeping with the jurisdiction agreement, the Applicant's jurisdictional challenge is contained in self-standing special pleas in each of the statements of defence. The jurisdiction agreement and the parties' conduct shows that there is an intention to deal with the jurisdictional challenge upfront – Mr Mpontshana also confirms that this should be dealt with as a “preliminary matter”. In keeping with the goal of private arbitration proceedings to deal with disputes expeditiously and economically, it would be very surprising if this challenge was not dealt with as a separated issue before delving into the merits of the claims, if it comes to that.
28. I put it to counsel that it must be a tacit term of in the jurisdiction agreement that the arbitrator is also given the authority to make a cost order. Both counsel agreed that this was the case. The arbitrator's authority to make a cost order in respect of the jurisdictional challenge is therefore not in question.
29. As matters stand, pleadings have closed in the arbitration – neither party contended that any further pleadings stood to be filed. The costs in respect of bringing the arbitration proceedings to their current state has already been incurred. Assuming that the sensible approach is implemented and the jurisdictional challenge is dealt with upfront on a separated basis (and there is no suggestion that this would not be the case), the only further costs that stand to be incurred are those in respect of the jurisdictional challenge, which costs will then be the subject of a cost award by the arbitrator. No other wasted costs are currently envisaged, by which I mean costs that would be incurred in respect of litigating on the merits of the matter which will become wasted if the arbitrator finds that he does not have jurisdiction.

30. In the present circumstances the cost consideration accordingly does not fall in the category of significant amounts of wasted cost. By contrast, the value of keeping the parties to the bargain that they struck outweighs the cost consideration.
31. I am accordingly not persuaded that an appeal would have any reasonable prospects of success on this score.

ANY OTHER COMPELLING REASON

32. Mr Els in argument also sought to rely on there being a compelling reason why the appeal should be heard. This was not raised in the notice of application for leave to appeal, but even if it had, there is no merit in this argument:

32.1 With the exclusion of challenging the applicability of *Nomihold v Mobile Telesystems Finance SA* [2012] EWHC 130, the Applicant does not contend that the legal principles set out in the judgment are wrong. The challenge to *Nomihold's* applicability was only pursued on the basis that the English Arbitration Act of 1996 imposes different principles. *Nomihold*, however, was not decided upon any provisions of the English Arbitration Act that stand to be distinguished from the law of arbitration as applied in South Africa. I accordingly do not view the principles set out in paragraphs 66 to 69 as being in any way controversial.

32.2 There are no conflicting judgments.

32.3 The grounds upon which a court's discretion should be exercised will in all instances be fact dependent. Little, if anything, can therefore be served by asking another court to, as Mr Els put it, "provide guidance" on what general principles should be brought bear on a case such as the present. All the general principles already appear from the judgment and these are not being attacked as inapplicable – rather the attack is that they were applied incorrectly.

CONCLUSION

33. In the premises, I find that an appeal would not have a reasonable prospect of success.

ORDER

34. I accordingly make the following order:

34.1 The application for leave to appeal is dismissed.

34.2 The Applicant to pay the costs.



DIRK R. VAN ZYL

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant: Adv A. P. J. Els

Instructed by: Thomas & Swanepoel Inc

For the First Respondent: Adv I. Pillay SC

Instructed by: Mpungose & Dlamini Inc